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Supreme Court, U.S.
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No. 85-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VICKIE JEAN RATLIFF PECK, individually and as Administratrix of the Estate of HOLLEY MICHAEL RATLIFF, deceased, acting by and through his heir at law and Administratrix, VICKIE JEAN RATLIFF,
Petitioners,

vs.

THE M/V MORRIS HARVEY, M/V #265183, a registered diesel towboat, MADISON COAL AND SUPPLY, INC., a corporation, PRIVATE PLEASURE BOAT WV, 7380, AB, a registered small craft, PAUL KESSINGER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT MADISON COAL & SUPPLY, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sufficiency of the lookout maintained by a vessel is a question of fact to be determined under the attending circumstances.

2. Whether an expert witness can properly refer to a state 0.10% blood alcohol standard in a maritime wrongful death action in order to explain his testimony concerning the plaintiffs' decedent's level of intoxication.

PARTIES

The parties to this action are set forth in the petition. Madison Coal & Supply, Inc. is a wholly owned subsidiary of Port Amherst, Ltd.

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I. STATEMENT OF THE CASE

Petitioners' recitation of the "facts" leaves a great deal to be desired, primarily in the area of accuracy. This respondent will endeavor to present a fair indication of the pertinent facts as disclosed by the evidence in this case.

The petitioners' decedent, Holley Michael Ratliff, drowned in the Kanawha River around 2:00 a.m. on August 31, 1980. Immediately before his death and for a substantial period of time prior thereto, Mr. Ratliff had been drinking beer, and he and several others had been on board an unlighted pontoon boat, drifting in the river without power. Respondent's Appendix at 1a-9a. The pontoon boat was owned by the defendant Paul Kessinger, who was also aboard. The undisputed fact is that Mr. Ratliff had a blood alcohol level of 0.22% at the time of his death. Respondent's Appendix at 19a.

The Motor Vessel Morris Harvey, owned and operated by the defendant Madison Coal & Supply, Inc. (hereafter "Madison") was pushing a tow of barges up the Kanawha River, and the lead barge collided with the pontoon boat. All but one of the occupants of the pontoon boat jumped overboard just before the collision and Holley Michael Ratliff drowned as a result of jumping overboard. Respondent's Appendix at 18a. The weather at the time of the accident was clear.

Clyde Hammack, Jr. was piloting the Morris Harvey. Hammack was proceeding up the river at the slowest speed possible, with the radar on, using the searchlight, looking for other vessels. Respondent's Appendix at 11a, 13a, 14a.

Andrew Cogis was standing watch with Mr. Hammack at the time of the accident. Respondent's Appendix at 14a. Cogis, a watchman, was acting as a lookout in the pilothouse. Respondent's Appendix at 11a. Cogis was engaged in *no other activities, only that of lookout,* at and before the time of the accident. Respondent's Appendix at 14a. Respondent's expert witness testified that Cogis was stationed in the best possible location to act as a lookout, and that a lookout at the head of the tow would have been blinded by a searchlight. Respondent's Appendix 17a. The term "tow" refers to the string of barges in front of the towboat. The head of the tow simply refers to the forward portion of the lead barge.

There was conflicting evidence at trial regarding the amount of light reflected on the river by street lights in the area. *See* Respondent's Appendix at 2a. The uncontradicted testimony of several witnesses, however, was that you could not see the pontoon boat unless you were very close to it, and knew beforehand that it was there. Respondent's Appendix at 9a, 10a.

The plaintiff brought suit against numerous named parties, and the case went to trial against defendants Madison and Paul Kessinger. This matter was tried to a jury. The District Court heard lengthy argument on the proposed jury instructions and on all other legal issues presented throughout the trial. After six days of trial, the jury found the plaintiff's decedent, Holley Michael Ratliff, 75% negligent, the defendant Paul Kessinger 25% negligent, and the defendant Madison 0% negligent.

II. REASONS WHY THE PETITION SHOULD BE DENIED

A. THE FOURTH CIRCUIT'S HOLDING THAT THE DUTY TO MAINTAIN A PROPER LOOKOUT DOES NOT REQUIRE AS A FLAT AND UNYIELDING OBLIGATION THE POSTING OF A LOOKOUT AT THE HEAD OF THE FORWARD BARGE IS A CORRECT STATEMENT OF THE LAW, CONSISTENT WITH PRIOR FEDERAL CASES, AND DOES NOT RAISE IMPORTANT ISSUES NECESSARY TO BE DECIDED BY THIS COURT.

1. Petitioners' First Question Presented Misstates The Holding Of The Court Below, Demonstrates A Misunderstanding Of The Concept of "Statutory Fault", And Is Not Raised By The Decision Below.

The question presented by the petitioner is stated as follows:

> Whether failure to maintain a bow lookout in conditions of good visibility creates a mere rebuttable presumption of negligence as ruled by the Fourth Circuit, or constitutes statutory fault, as ruled by all other federal circuits.

Petitioners' question presented misstates the Fourth Circuit's holding, and miscontrues the concept of statutory fault. The question before the Fourth Circuit was whether there was an absolute duty to have a lookout at the head of the tow under all circumstances as a matter of law. The Court answered no, holding that the sufficiency of the lookout is a question of fact to be considered under the circumstances presented in each case. See Petitioners' Appendix at 4a. Contrary to petitioners' assertions, the Court did not hold that failure to post a bow lookout creates a re-

buttable presumption of negligence. The Court did state that a factual finding of failure to maintain a *proper lookout* (which may or may not involve a "bow" lookout) imposed a burden on the operator of the vessel to establish that such failure did not contribute to the accident.

Petitioners have never come to grips with the fact that a "proper" lookout is not equivalent to a bow lookout or a lookout in the head of the tow. To maintain a proper, adequate lookout is clearly a *legal duty* of good maritime navigation. However, the exact methods that must be employed in a given instance to meet that duty vary and are to be considered factually under the circumstances posed. Sometimes a "proper" lookout requires radar; sometimes a watchman; sometimes a watchman on the bridge, sometimes on the bow, sometimes both; sometimes a proper lookout requires all these things, or none of them. The point is that the *duty* is to maintain an *adequate* lookout, and it cannot be met by using a specific lookout in a specific location under all circumstances.

Petitioners assert that the Fourth Circuit's holding is inconsistent with the "statutory fault" rule. While it should first be noted that the Fourth Circuit's holding that the failure to maintain a proper lookout is not a statutory fault is correct in that this duty is not imposed by statute, *see* 33 U.S. § 221, petitioners' point still is nothing more than semantic. Under the *Pennsylvania* or "statutory fault" rule, where a vessel is in violation of a statutory rule intended to avoid collisions it is presumed to be at fault in a collision and has the burden of establishing that its fault did not contribute to the collision. *The Pennsylvania*, 86 U.S. 125 (1874). Thus the burden placed on one for

statutory fault is the same burden placed on one for failure to maintain a proper lookout, and even assuming *arguendo* that the Fourth Circuit should have considered failure to maintain a proper lookout a statutory fault, the analysis would still be the same and equally correct. The first step would be to find as a matter of fact that a proper lookout had not been maintained; such a finding was not made in this case. Next, whether called a "statutory fault" or just a "failure to maintain a proper lookout", the burden would shift to the vessel found to be delinquent; here again, since there was no underlying factual finding, the second step was never reached. The Fourth Circuit's analysis, however, was right in either event.

2. The Fourth Circuit's Holding That The Duty To Maintain A Proper Lookout Does Not Invariably Require The Posting Of A Lookout At The Head Of The Forward Barge Is Consistent With The Case Law Of This Court And The Other Federal Circuits.

The Fourth Circuit has consistently held for at least 55 years that a lookout does not invariably have to be placed at the head of the tow, and that the sufficiency of the lookout is a question of fact under the circumstances. *See, e.g., Anthony v. International Paper Company*, 289 F.2d 574 (4th Cir. 1961); *Columbia Dredging Co. v. New York P. & N. R. Co.*, 46 F.2d 988 (4th Cir. 1931). The Court's decision below is not a radical change in the law, and neither creates nor perpetuates a split of authority among the circuit courts.

In fact the Fourth Circuit's decision is consistent with the cases of the other federal circuits. For example in *Capt'n Mark v. Sea Fever Corp.*, 692 F.2d 163 (1st Cir. 1982) the First Circuit, citing *Anthony, supra*, refused to impose the requirement of a for-

ward lookout as a matter of law, and held that the adequacy of the lookout must be evaluated realistically in light of all the circumstances. *Capt'n Mark* at 166. *See also Pinto v. M/S Fernwood*, 507 F.2d 1327 (1st Cir. 1974). The Fifth Circuit cases are also very much in line with the Fourth Circuit's decision in this case below. The case of *Inland Oil & Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983) involved facts quite similar to those in the case at bar and the Court reached the same result that the Fourth Circuit reached in this case. *See also China Union Lines, Limited v. A. O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967); *Cenac Towing Co. v. Keystone Shipping Co.*, 404 F.2d 698 (5th Cir. 1968).

The Second Circuit cases are also in accord with the decision herein. In *Moran Towing & Transp. Co., Inc. v. City of New York*, 620 F.2d 356 (2d Cir. 1980) the Second Circuit stated:

> The City has argued that the lookout was improperly positioned because he was not on the bow of the barge. Both the lookout and the mate testified that the lookout's station in the wheelhouse provided the best view and allowed the lookout to communicate easily with the mate. In view of all the circumstances, we find that the lookout was properly stationed in the wheelhouse. *See, e.g., Moran Towing & Transp. Co., Inc.*, 177 F.2d 607 (2nd Cir. 1952); *Columbia Dredging Corp. v. New York P. & N. R. Co.*, 46 F.2d 988 (4th Cir. 1931).

620 F.2d 356, 357 n.1.

Thus, contrary to the petitioners' assertions, the decision below clearly is not in conflict with the decisions of the First, Second, or Fifth Circuits, or any other circuit for that matter. While respondent concedes that there are cases which have found *in particular circumstances and as a matter of fact* that the lookout should be on the bow, there is no absolute rule that the lookout be on the bow *as a matter of law* regardless of the circumstances. A district court opinion from the Southern District of New York explains this point, which the petitioners have never been able to understand:

> There is authority in the *earlier cases* for the proposition that a lookout should be posted in the bow *especially if the visibility is poor, United States v. The Adrastus*, 190 F.2d 883, 886 (2d Cir. 1951). But the rule is not hard and fast... In the case at bar, defendants' expert witness Warren Harday, who has sailed as master on container ships such as the EXPRESS, testified that in clear visibility it is the practice on such vessels to post the lookout on the wings of the bridge rather than on the bow.

Granholm v. Vessel TFL Exp., 576 F. Supp. 435 (S.D.N.Y. 1983).

The plaintiff claims that several 19th century United States Supreme Court cases lay down a requirement for a bow lookout as a matter of law. The petitioners' interpretation of these cases is simply inconceivable in light of circuit court cases such as *Anthony, Capt'n Mark, Cenac Towing, Inland Oil* and *Moran Towing, supra*, which reject a duty to place a bow lookout as a matter of law, and hold the adequacy of the lookout

to be a question of fact. It is impossible to believe that these various circuit courts would flaunt the teachings of the Supreme Court, without even citing the cases the petitioners rely on.

What is far more likely, and in fact true, is that the petitioners' reading of these cases is wrong. The cases referred to by petitioners do not require a bow lookout under all circumstances. *The Ottawa*, 70 U.S. 268 (1866), the most frequently cited of the cases referred to by the petitioners, illustrates this point. The court in *The Ottawa* stated ". . . in *general* elevated positions are not so favorable situations as those *more usually* selected on the forward part of the vessel." 70 U.S. at 273. (emphasis added.) The use of the language "in general" and "usually" clearly indicates the absence of a hard and fast rule requiring a bow lookout as a matter of law, and the need to consider the circumstances of each particular case. *See also Haney v. Baltimore Steam Packet Co.*, 64 U.S. 287 (1860).

The Third Circuit's opinion in *The Mamei*, 152 F.2d 924 (3d Cir. 1945), *cert. denied*, 328 U.S. 836 (1946), clearly confirms this conclusion. In *The Mamei* the same contention made by the plaintiff in the case at hand was made and soundly rejected. The Third Circuit held in that case that *The Ottawa* did not require a forward lookout in all cases and that the question of the sufficiency of the lookout depended on the circumstances of each particular case. 152 F.2d at 929. The court went on to find that a lookout in the pilot house 365 feet from the lead barge was a sufficient lookout under the facts presented. *See also The Osaka Shosen Kaisha, Ltd. v. Elene*, 190 F. Supp. 201 (D. Md. 1961), *aff'd in part and rev'd in part*, 301

F.2d 59 (4th Cir. 1962) (lookout held to be question of fact and *The Ottawa* cited as authority). Clearly none of the cases relied on by petitioners require a bow lookout in all cases as a matter of law regardless of the circumstances.

The petitioners' assertion of a duty to maintain a bow lookout at all times is also contradicted by the Coast Guard Notice to Mariners on which petitioners so heavily rely. If there exists an absolute duty to have a lookout on the head of the tow, it would be quite strange for the Coast Guard, charged with the duty of enforcing the Rules of the Road, merely to recommend that mariners "should *consider* the use" of such a lookout, which is precisely what the Notice to Mariners did. Petitioners' Appendix at 18a. Furthermore, the testimony of petitioners' own expert, who testified that there is no rule or requirement mandating a lookout at the head of the tow, undermines petitioners' argument. Petitioners' Appendix at 4a.

Clearly the decision below is an accurate statement of the law consistent with the reported federal cases. The cases which petitioners cite stating the need for bow lookouts do not set forth a requirement to have a foward lookout as a matter of law. Rather, those cases found under the specific circumstances presented that there was a need to have a forward lookout. The Fourth Circuit thus properly held that there is not an absolute and unyielding obligation to have a bow lookout in every case regardless of the circumstances.

3. The Decision Below Does Not Present Any Important Questions Which Must Be Resolved By This Court.

Petitioners in this case were given a full and fair opportunity to present their arguments to a jury,[1] and

[1] Plaintiffs demanded a trial by jury in their complaint.

the jury rejected their arguments. The Fourth Circuit has done likewise. Petitioners now seek a third chance to present these arguments by petitioning this Court. Virtually all the arguments presented by the petition are factual arguments which have been properly addressed, rejected, reviewed, and rejected again. At this stage of the proceedings this respondent will not burden the Court with a discussion of the many inaccuracies and fallacies in these arguments. It is sufficient to note that these disputes simply do not raise issues of national importance which should be addressed by this Court. The unpublished per curiam opinion rendered below clearly indicates the lack of importance of this case to persons other than the parties.

B. ALLOWING DR. SOPHER'S REFERENCE TO THE WEST VIRGINIA INTOXICATION STATUTE FOR THE PURPOSE OF ILLUSTRATION WAS ENTIRELY PROPER AND RAISES NO IMPORTANT ISSUES WHICH NEED TO BE REVIEWED BY THIS COURT.

There can be no dispute that petitioners' decedent, with a scientifically established and uncontested blood alcohol level of 0.22%, was very intoxicated, and that his intoxication caused or contributed to his drowning. *See* Respondent's Appendix at 21a-24a. Dr. Sopher's reference to 0.10% blood alcohol was merely for illustrative purposes, and the jury was so instructed. Respondent's Appendix at 21a, 23a. The 0.10% blood alcohol level used as a standard in motor vehicle statutes has been referred to by analogy in many admiralty cases. *See, e.g., Reyes v. Vantage S.S. Co.,*

Defendants did not object to a jury trial, and a jury trial was had by consent. Federal Rule of Civil Procedure 39(c)

Inc., 609 F.2d 140 (5th Cir. 1980); *Schlichter v. Port Arthur Towing Company*, 288 F.2d 801 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961); *Palmer v. Ribax, Inc.*, 407 F. Supp. 974 (M.D. Fla. 1976); *Collins v. Indiana & Michigan Elec. Co.*, 516 F. Supp. 304 (S.D. Ind. 1981).

The trial judge's decision to allow reference to the 0.10% blood alcohol standard was clearly proper because it aided the jury in understanding Dr. Sopher's testimony. The ruling which petitioners seek to have this Court review was simply an evidentiary ruling, made in the heat of trial, as to whether the probative value of the reference outweighed any prejudicial effect. Federal Rule of Evidence 403. A reading of Dr. Sopher's testimony reveals the value of the reference in putting the decedent's intoxicated condition into perspective and illustrating the extent of his incapacitation. Respondent's Appendix at 20a, 21a. This ruling by its very nature depended on the particular facts of this case, and this simple evidentiary issue is not the type of question to which this Court should devote its resources.

III. CONCLUSION

The Fourth Circuit correctly ruled that there is no absolute duty to have a forward lookout as a matter of law in all circumstances. This ruling is in accord with the cases decided by the other federal circuits and this Court. The reference to the 0.10% blood alcohol standard was properly admitted to illustrate the medical examiner's testimony, consistent with the reported case law and the discretion customarily accorded to trial judges with respect to evidentiary matters.

The decision below, in addition to being correct on the merits, is not in substantial conflict with the decisions of the other circuits or this Court, does not depart from the accepted and usual course of judicial proceedings, and presents no important federal questions. For these reasons petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

CROSS EXAMINATION: ALPHONSE BARIA

* * * * *

Q. Was it displaying any lights of any kind?

A. Now in my deposition I said no.

Q. You said in your deposition?

A. That I did not see no lights, and I still have to say I can't remember no lights.

Q. None at all?

A. None at all.

Q. Mr. Ratliff knew someone on the pontoon boat?

A. Yes, sir.

Q. And that was Mr. Kessinger?

A. Yes, sir.

Q. He was the first one —Mr. Ratliff was the first one on to the pontoon boat?

A. Yes, sir.

Q. If I understand your direct testimony correctly you could not tell as he transmitted the bow of your boat to get on the pontoon boat whether any unsteadiness he had was as a result of the boat or could have been partly of result of his drinking?

A. Yes. Weight a minute—

Q. There was some unsteadiness?

A. There was some, yes.

* * * * *

DIRECT EXAMINATION: CARLOS BURDETTE

* * * * *

Q. Okay. Do you recall, do you recall whether the street lights along the river on the, along Kanawha Boulevard and along MacCorkle Avenue were lit that evening?

A. I really didn't pay any attention. You could see each other, so I guess that they were lit.

Q. You had plenty of light to see each other by?

A. Yes.

Q. Could you see other boats on the river?

A. Yes.

Q. Could you make out faces clearly from the light that you had?

A. You mean the faces on our boat.

Q. Yes. And other people's boat?

A. Not on other people's boat. You could on our boat.

Q. Okay. Now, about how long—what did you do after your boat drifted over to the Charleston side about the level of Broad Street?

A. We pushed off and went back out toward the middle.

Q. Who pushed it off?

A. Me and Bill Grealis.

Q. Then what happened?

A. We just drifted for a while.

Q. Then what happened?

A. We saw the barge coming.

* * * * *

CROSS EXAMINATION: CARLOS BURDETTE

* * * * *

Q. About a problem with the boat?

A. That's right.

Q. Mr. Burdette, when you came to the pontoon boat and during all the time after that when you were on it, did you ever see any lights on the pontoon boat?

A. I don't recall any.

Q. You never saw it display any lights at any time during this hour or so, is that correct?

A. Correct.

Q. Did the motor, was the motor operating when you came to the pontoon boat?

A. It was drifting.

Q. Was the motor ever operating during the time you were on it?

A. No.

Q. At any time did anyone suggest when the barges were approaching, suggest using a flare/ or any kind of signaling device?

A. No.

Q. No one mentioned that?

A. Not as I recall.

Q. You indicated that you do not recall seeing any lights on the barges?

A. No.

* * * * *

CROSS EXAMINATION: MARTHA CHAPMAN

* * * * *

Q. Do you recall also, Miss Chapman, talking with a gentleman, I believe his name was Mr. Lamp and giving a statement to him on the 5th of September of 1980, which was a few days after this accident, do you remember that?

A. I talked to two people after that.

Q. Do you remember signing that statement?

A. Yes.

Q. Do you remember signing a statement that says, "I don't know if Paul had any lights on in the boat. When I got off Paul's boat on to Pee-Wee's boat some of the guys were trying to get the motor started. The motor was never on while I was on Paul's boat." Do you recall that statement?

A. No, sir, I don't.

Q. You do recall giving a statement?

A. Yes.

Q. And signing a statement?

A. Yes.

Q. Miss Chapman, do I recollect your testimony correctly that during the time that you were out there that night there were a lot of boats anchored?

A. Yes.

* * * * *

DIRECT EXAMINATION: WILLIAM GREALIS

* * * * *

Q. When you came in contact with the pontoon boat, can you describe for the jury what it looked like?

A. Just—it looked like something flat with two, looked like, drums or something under, at the deck seat, and had a canopy thing on it.

Q. Do you remember what color the canopy was?

A. No, I don't.

Q. Do you remember what color the drums or pontoons were?

A. No, sir.

Q. Were you able to see it as you came up to it?

A. The pontoon boat?

Q. Yeah?

A. Yes, sir.

Q. Was there light enough on the river to see that boat and other boats as you cruised along?

A. Yes.

Q. Did you observe as you came up to the pontoon boat whether it was displaying any lights?

A. No it wasn't.

Q. Now, did you board the pontoon boat?

A. Yes, I did.

Q. Who else got on board it?

A. Derwin Parker, Mike Ratliff, Darnell Burdette and myself.

* * * * *

---

* * * * *

Q. His boat. And you approached the pontoon boat?

A. Yes.

Q. You indicated that you saw it, but it didn't have any lights on it?

A. Yes.

Q. Do you know how far away from it you were when you first saw it?

A. No.

Q. Were you fairly close?

A. I would say yes.

Q. Now when you first got up to the pontoon boat there were three people on it?

A. Yes.

Q. Do you know any of their names? Mr. Grealis was one a woman?

A. Yes. It was a woman.

Q. Was one a younger fellow and one an older fellow?

A. Yes.

Q. Do you know what the older fellow was doing?

A. I'm sorry.

Q. Do you know what the older fellow was doing when you came up to the pontoon boat?

A. He was laying on one end of the boat.

* * * * *

CROSS EXAMINATION: WILLIAM GREALIS

* * * * *

Q. Did you find any others?

A. What we found, I took to be a piece of an oar.

Q. Did you find any other kind of flotation devices of any kind?

A. No.

Q. There were no life jackets?

A. No. None that I saw.

Q. Did anyone come on board the pontoon boat wearing a life jacket?

A. No.

Q. Was there alcohol or alcoholic beverages on the pontoon boat, Mr. Grealis?

A. I did see some beer bottles on the pontoon boat.

Q. And you all spent probably more than an hour drifting in the boat before the accident?

A. Probably, yes.

Q. Was the motor—did they ever get the motor started?

A. No.

Q. Were you aware at any time, any time from the time you came up to the pontoon boat until the accident that it ever had any lights on it at all?

A. No.

Q. No lights?

A. No.

* * * * *

DIRECT EXAMINATION: ROBERT HILL

* * * * *

Q. And did it start?

A. No. It did not start.

Q. Had there been any problems starting the engine before that to the best of your knowledge?

A. Not to the best of my knowledge, no.

Q. Where was the pontoon boat located in the river at the time you first learned the barges were coming toward you?

A. Well we was right about the C & O Bridge there.

Q. Do you remember where you were with respect to the center line of the river?

A. Not right correct, no. We was right there at the C & O Bridge.

Q. Were there street lights along either side or both sides of the river at the point where the boat was located when you first saw those barges?

A. Well, I don't remember.

Q. Was there any light on the river?

A. Not to my knowledge.

Q. You remember whether the lights on your nephew's boat were burning at the time you saw those barges?

A. Yes, they was.

Q. Which lights do you specifically recall?

A. Well, he had two bow lights on the front and back lights on the back up about three foot, and he had an overhead dome

* * * * *

CROSS EXAMINATION: PAUL KESSINGER

* * * * *

Q. Is it your understanding or down that small pleasure crafts such as yours under ordinary circumstances give way to a larger vessel, like a tow?

A. Yes, sir.

Q. The big vessel has the right of way?

A. Yes, sir, it does.

Q. Are you aware also in a situation where two vessels are approaching at an angle that the vessel to the right, to the starboard side has the right of way?

A. I thought you passed starboard to—

Q. You pass port to port?

A. Port to port, yes, that's correct.

Q. So whichever way I turned, the vessel that has—the other vessel to the right gives way?

A. Yes, sir.

Q. On the evening in question, Mr. Kessinger and on the afternoon in question, you and others that were on your pontoon boat had had alcohol to drink, had you not?

A. Yes, sir. We had been drinking beer.

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CROSS EXAMINATION: DAVID ESTEP

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Q. The first time you didn't see anything when you looked out?

A. I don't think I did.

Q. Did you ever at any time that you were watching, even after you identified a boat, did you ever see any lights on that boat?

A. No.

Q. No lights displayed of any kind?

A. No.

Q. Could you even tell much about the boat, color or anything like that?

A. No.

Q. Now there was some lighting back here on the Capitol street side so that you were looking from water level toward the boat with some back lighting?

A. Right.

Q. And still all you saw or could make out was a silhouette at most?

A. Right.

Q. This was on the second occasion?

A. The first time, of course, I couldn't see anything.

Q. Couldn't see anything?

A. And the second time before they were illuminated I could see a silhouette. I thought it was a pontoon boat the way it . . .

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DIRECT EXAMINATION: CLYDE HAMMOCK, JR.

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Q. But you don't remember whether there was or wasn't?

A. Right. Right off, I don't.

Q. And if there had been a ghost on the radar so that you couldn't count on it, what would you have done?

A. I had my search light on.

Q. Okay. And what kind of system were you following in checking with your search light?

A. I was running slow, you know, looking.

Q. Did you have, did you have any help in scanning the radar and operating the search light from Mr. Cogis or anybody else that night?

A. Could you say that again, please.

Q. Well, did you have any help in operating the search lights or looking at the radar screen that night from Mr. Cogis or anybody else?

A. No. I looked at the radar, the search light and everything myself.

Q. Did it all yourself?

A. Yes.

Q. Where was Mr. Cogis stationed that night?

A. He was in the pilot house.

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Q. Somewhere around two to two and a half or three mile per hour?

Q. Okay, now, in order to move that tow at two, two and a half or three miles an hour did you need to run those engines the full throttle or were you at reduced?

A. I was slowed back.

Q. Does that mean throttle back?

A. As slow as they could run.

Q. When you reversed your screws, did you give more power to the engine but just backwards so they were trying to pull the boat backwards instead of frontward?

A. I don't really remember. I just remember backing her up, you know.

Q. Well, what would be standard practice to do if you suddenly find yourself in a collision situation and you are going forward at two and a half miles per hour, wouldn't your normal practice be to throttle, reverse the engines and give them maximum throttle backwards?

A. Well, not necessarily it wouldn't.

Q. Why not?

A. Well, you know I can't really remember why I backed it full a stern then or not. I just don't remember.

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Q If there was a twist of some kind, were you correcting for it?

A Naturally I was, you know.

Q Cause the boat was going where you wanted it to go?

A Yes.

Q Did you have any trouble maneuvering the boat?

A No.

Q That evening?

A None at all.

Q So, again, on whatever question might be questioned of you, assuming twists or a sudden gust of wind or anything like that, you drove the boat, didn't you?

A Yes, sir.

Q You were putting it where you wanted it to go?

A Yes.

Q As you maneuvered up the river that evening, Junior, what power setting were you using?

A Power setting, you mean as far as.

Q On the engines?

A Just the first, the first notch is kind of like the controls, you know, you just push them up and there is one notch, you know that's idle, like slow bell.

Q Is that the lowest power setting on your throttle that starts the proper turning?

A Yes.

Q It's the slowest you can set the boat to go?

A Yes, the first one.

Q If you pulled it back from that notch you would disengage the props?

A Yes. You would be in neutral.

Q So it's the first notch up there?

A Yes, it's, you know, something like a notch, it's just where you just shove it up and it kind of like catches, sort of.

Q Is that the setting you use when you are transiting harbors or cities or whatever?

A Well, that's slow bell and that's, you know, that would be, that's about the best that you could do.

Q In some harbors or in daylight or other conditions you might go a little faster than that?

A Oh, yeah you will be working her.

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CROSS EXAMINATION: ANDREW GOGIS

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Q Mr. Cogis, tell the jury what kind of pilot Junior Hammack was in your opinion back in August of 1980?

A As a pilot and as a young pilot, I think Junior Hammack was one of the best young pilots that I ever worked for. He was very cautious. He would, when we go in landing and everything he always went in at a slow pace, never banged the barges around and always on the lookout for his crew. And I can honestly say if I had a chance to work with him again, I sure would like to work with him.

Q Is he what you call a gentle pilot in his handing of the boat?

A Yes, sir.

Q On the night in question as you were coming up river, you were in the pilot house?

A Yes, sir.

Q With Junior. From the Elk River or Blaine Island or somewhere in that vicinity up until the point where the collision apparently occurred, did you have anything that you were doing other than being in the pilot house and looking out for other boats and assisting the pilot in clearing?

A No, sir.

Q Was that the only thing you were doing?

A Yes, sir.

Q Did you have anything to aid you?

A Yes, sir. I had a pair of binoculars.

Q How were you using those?

A I was using them as following the spotlight when it goes from port to starboard and from starboard to port, when he was searching back and forth.

Q The boat that you encountered before the South Side Bridge, down around the Levy, did Junior pick that up in the spotlight?

A Yes, sir.

Q You saw it in the spotlight and you stopped?

A Yes, sir.

Q What did the boat do?

A The boat, Junior killed it out and he stopped. The boat just stood there and then when Junior blew the horn, whether they was sleeping or what was going on is not to my knowledge, I don't know, but finally he woke up and started the engine and then his lights, his green light and red light on the boat there that he had on there, it came on and he proceeded to get out of the way?

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Q You talked about the height of these barges from the water line. Might you be two or three feet off? I'm not suggesting that you are, I'm just asking you if you had measured them or if that's an estimate?

A Yes, sir, it's a possibility.

Q Was the radar working and was it on?

A Yes, sir.

Q Did it appear to you, based on your limited experience, that it was showing the banks and things as you went up?

A Yes, sir.

Q The banks of the river?

A Yes, sir.

Q You know basically what it looks like when it's working?

A Yes, sir, I do.

Q You also mentioned the conditions, there were other boats around during this time of night. Was this a good time to go through there, 2:00 o'clock a.m.?

A To my knowledge, it was, sir.

Q And better probably than the previous afternoon or something?

A Yes, sir. Sure would be.

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DIRECT EXAMINATION: ARNE HEGGERS

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"Q. And you can't remember if you inspected it before or after you talked to Hammack and Copus?

"A. Right. I can't recall which took place first.

"Q. But would the questioning of Hammack, Copus and the inspect of the pontoon boat all have taken place within an hour after you had arrived?

"A. It was one of the first things we did.

"Q. Okay. Did you question anyone to determine whether the lights of the motorboat had been worked on subsequent to the collision and before you inspected the pontoon?

"A. Yes. We asked if anything had been touched or moved.

"Q. And what was the response?

"A. No.

"Q. Who did you ask?

"A. The people on the tow boat.

"Q. Okay. Did you ask Mr. Kessinger if the lights on his boat were working before the collision?

"A. Yes.

"Q. What did he tell you?

"A. He said that the lights were working, that the lights were off because they drained the battery.

"Q. But you were able, but the battery had recharged itself, I guess, when you went to check it?

"A. Just cause it drains the battery doesn't mean—

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DIRECT EXAMINATION: JOHN BEATTY

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Q. You would have had the lookout where he was in the pilot house?

A. Exactly.

Q. Would you explain to the jury why that is where you would have put it?

A. Well, the reason being that any time you have a man or a deck crew out on decks on a tow, any time that you turn the search light on regardless of which way they are facing, whether they were facing the light or facing the head of the tow or looking out across the tow, it will bother their eyes to the point that they can't see anything. They are not even capable of safely walking back to the boat until you turn that light out. It will definitely blind you. And—

Q. Are you saying that, Mr. Beatty because you have been out there?

A. Very definitely I have been out there.

Q. Would it have been safe in your opinion to have proceeded up river in Charleston that evening without using your search light?

A. No. You have to do that to make your presence known. You have to use your search light so that—you're much better off to have it on, at least they know you are out there some place.

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DIRECT EXAMINATION: IRVIN SOPHER

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Medical Examiner, anything about the body in your examination of it that would indicate to you that this man was unconscious at the time that he died?

A. There is no reason from the outside examination of the body to expect that the man was unconscious at the time that he died, no, sir. The cause of death was drowning. This gentlemen had a large white, what we call a mushroom cap, c-a-p, mushroom cap of foam from the nostrils and mouth and this is a pathologic sign of drowning in a body that is found or recovered from a body of water. So the cause of death in this case is drowning.

Q. Dr. Sopher, did you draw a blood sample from the body of Holley Michael Ratliff?

A. Yes, sir.

Q. And did you examine that blood sample?

A. Yes, sir.

Q. Did you examine that blood sample from the standpoint of determining what the blood alcohol level was in that body?

A. Yes, sir.

Q. What were the results of that test?

A. The blood alcohol level was 0.22 percent as noted on the second page of the report. 0.22 percent, that is a little over two tenths of one percent of alcohol in the blood.

Q. Dr. Sopher, in your opinion, what the blood alcohol level of Holley Michael Ratliff at the time of the drowning?

A. The blood alcohol level of Mr. Ratliff at the time of his drowning would have been approximately that same figure, that is 0.22 percent of blood alcohol at the time that he drown and died.

Q. And so that the jury may put that testimony into some sort of perspective, Doctor, will you tell them please, what in your experience, for example, is the medium level of blood alcohol found in fatal auto accident drivers?

MR. MILLER: I object, Your Honor. I would like to approach the bench on this.

(Bench conference among counsel and Mr. Kessinger.)

MR. MILLER: Your Honor, it's, I'm sure the basis for my objection is obvious. What possible bearing does the medium alcohol level in an automobile accident have to do with a boat accident. I know there has been—

MR. EMCH: I will withdraw the question.

MR. MILLER: Thank you.

(Proceedings resumed.)

Q. Dr. Sopher, in your experience can you characterize to the jury what 0.22 means. Is that high, low, average?

MR. MILLER: Objection, unless he lays a proper foundation for the question, Your Honor.

Q. All right. Dr. Sopher, do you have occasion in your capacity as Chief Medical Examiner to examine a large number of bodies in which blood alcohol is an important consideration?

A. Yes, sir. Unfortunately too many bodies with blood alcohol with a consideration, yes, sir.

Q. You do that very routinely?

A. Yes, sir, as part of medical-legal death investigation.

Q. And have during all of the 8 years that you have been Chief Medical Examiner?

A. Yes, sir, that is correct, yes, sir.

Q. Again, Doctor, let me ask you if you can characterize, based on your experience a .22 blood alcohol level to the jury?

A. The .22 percent blood alcohol level would represent, can I use the reference to legal intoxication of a motor vehicle operator.

MR. MILLER: Your Honor, I object. May we approach the bench.

THE WITNESS: All right, sir. I will stay away from that.

THE COURT: All right. Go ahead and answer it, that will be all right.

THE WITNESS: It would be all right in that reference.

THE COURT: Yes, sir.

THE WITNESS: All right .22 percent represents over twice the amount of alcohol allowed under the law in the State of West Virginia whereby one can operate a motor vehicle without being considered impaired to operate such a motor vehicle. And that is if a person has point 10 percent, point 10 percent or greater alcohol in their bodies while operating a motor vehicle, then they, if arrested and tried, are legally impaired and intoxicated to operate a motor vehicle, that is point 10 percent. In this particular, this is not a motor vehicle situation, but the blood showed an alcohol level in Mr. Ratliff of .22 percent, which is over twice as much alcohol in the blood of Mr. Ratliff. And if he had been driving a motor vehicle, which, of course he

wasn't, he would be considered intoxicated, to say the least.

Point 22 percent, to place another reference, would be roughly equivalent to let's say 15 cans of beer consumed over a 4 hour period. I'm not saying that this individual had, in fact, consumed 15 cans of beer in 4 hours, it might have been many more cans over 8 hours or it may have been a few less cans in two hours. But that is the magnitude of the type of alcohol level we are seeing, namely in the neighborhood of about 15 cans of beer over a 4 hour period, if one were to be able to consume that quantity of beer or on the other hand, 15 one ounce shots of whiskey in a 4 hour period.

MR. MILLER: Your Honor, at this point I will renew my objection and move the Court to ask the jury to disregard the references to the State of Wet Virginia Motor Vehicles Laws or in the alternative that the Court instruct the jury that those laws—there are no state or federal laws which pertaining to consumption of alcoholic beverages on the navigable water ways of the country, including the Kanawha River. I feel the risk of prejudice is so great here, Your Honor, that I make the motion that the jury be so instructed at this time.

THE COURT: Well, the Doctor, I think was using that to illustrate the degree of intoxication or apparent intoxication, and overruled.

All right, you may continue.

MR. EMCH: Thank you, Your Honor.

Q. Dr. Sopher, in your capacity as Chief Medical Examiner again, do you have occasion to examine bodies that have, where the person has become deceased in what might be called a recreational drowning incident.

A. Yes, sir. Many, many such cases.

Q. Do such cases in your experience, Doctor, or if you can do it this way, what percentage of such cases involve excessive use of alcohol?

MR. MILLER: Objection, Your Honor. Absolutely no reason to bring that into this case. It has no bearing on the material issue.

THE COURT: Sustained.

MR. MILLER: Thank you.

Q. Dr. Sopher, was Holley Michael Ratliff, in your opinion, intoxicated at the time of his death?

A. Yes, sir. It was obvious that he was severely intoxicated at the time that he died.

Q. In your opinion, I'm sorry—are you finished?

A. Yes. He was markedly intoxicated, yes.

Q. In your opinion, if you have one, Doctor, would a man that exhibited a .22 blood alcohol level be impaired?

A. There is no question that a person with this level of alcohol in his blood would be severely impaired in terms of any motor activity performance test, in any perameter that one would—

Q. By motor activity, what do you mean?

A. That would be muscular coordination, ability to react, reflex time, thought processes, judgment, visual recognition. This kind of alcohol is, is extremely elevated and does absolutely no one any good in any kind of a, either a thought process situation or performance situation.

Q. Would a .22 blood alcohol level, Doctor, in your opinion affect your breathing reflexes?

A. Yes. Could very well cause a problem.

Q. Doctor, in your opinion given your examination of the body of Holley Michal Ratliff, as you have discussed, is it

likely that this man's blood alcohol level had at least an effect or was a cause of his drowning?

MR. MILLER: Object to the form of the question, Your Honor. He hasn't laid a proper foundation. The question itself is not properly asked.
Q. Do you have an opinion, Dr. Sopher, based upon your examination and your experience as a medical examiner.

A. Yes, I would have an opinion on this.

MR. MILLER: Renew my objection. The question has not been properly asked. No proper foundation has been laid.

THE COURT: Well, overruled. All right, you may answer.
A. Let's me say this. We see good swimmers who drown in normal situations all the time. And a common denominator in those deaths is an elevated level of blood alcohol. That is—and considerably lesser levels than seen in the body of Mr. Ratliff. This is a scenario that may be that of a 20, 25 year old individual swiming across the lake, have been attending a picnic or just out having a party, good swimmer and he never reaches the opposite side.

MR. MILLER: Your Honor, at this point I am going to note that the Court has already, I have already objected and the Court has already sustained my objection to referring to investigations of other drowning accidents. And Mr. Emch is clearly violating the Court's ruling, and I will ask there be a cautionary instruction and Mr. Emch be cautioned to observe the rulings of the Court.

MR. EMCH: Your Honor, I'm sorry.

THE COURT: The Doctor was using that only by way of illustration. The jury will understand that.
Q. I would ask simply for your opinion, Doctor, relative to Mr. Ratliff?

A. In my opinion, I think what could be said is that certainly the high level of alcohol found within the body of Mr. Ratliff did not serve him in any positive fashion in his plight that particular evening. Whether this man would have survived his drowning episode had he not been drunk, I think is tough to say. I cannot necessarily say that. In other words, I could not say that had he not had a .22 percent alcohol or had he had a lesser degree of alcohol that he definitely would have survived. But we do see death due to drowning with much lesser levels of alcohol wherein there is not even a situation of a collission involved as our history shows in this particular case.

MR. EMCH: Thank you, Doctor.

CROSS-EXAMINATION

BY MR. MILLER:

Q. Doctor, I believe that your office also performed the—

MR. EMCH: Objection, Your Honor. May we approach the bench.

MR. MILLER: I haven't finished my question, Your Honor.

MR. EMCH: I would like to approach the bench.

(Bench conference with Court, counsel and Mr. Kessinger.)

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